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Supreme Court, U.S.
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No. 01-802

IN THE
Supreme Court of The United States

CAROL R. FISCHER,
DIRECTOR OF REVENUE OF THE STATE OF MISSOURI,
Petitioner,

v.

MARY E. LEWIS,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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Respondent Lewis concedes that the Eighth Circuit accepted her argument and concluded that the statute was unconstitutional on its face because it did not expressly preclude unconstitutional application. And she concedes that the court of appeals should not have addressed the facial invalidity issue. To nonetheless deprive that portion of the court's decision of sufficient force to compel consideration by this Court, Lewis now calls it "dicta" (Br. Opp. 5). She cites the court of appeals' alternative, "as-applied" basis for overturning the Director of Revenue's action. But in discussing that alternative, the court of appeals said nothing that would exempt future cases from its "facial invalidity" analysis. And Lewis does not and

cannot contest that the analysis goes beyond the case law of this and other courts in a key respect: it eliminates the need for a punishment or a sanction.

Lewis asserts that the court of appeals' analysis on the "as applied" question was the court's only real holding, and argues that the holding was correct for a reason that would not, if true, merit certiorari: that the Department of Revenue admitted that it rejected the ARYAN-1 plate because of distaste for the viewpoint (Br. Opp. at 4, 6-7). Rather than conclude that the plate was rejected for that reason, the court of appeals assumed that the plate was rejected "to prevent the occurrence of road rage" (Cert. Pet. App. A-22). Lewis wants to avoid that assumption because under prior precedent, preventing "road rage" is a legitimate basis for state action in this, a nonpublic forum.

1. Lewis ignores the fundamental point made in the first reason given for granting the petition: that the vagueness and overbreadth doctrines have not previously been applied, and should not be applied, when there is no threat of punishment or sanction.[1] Instead, Lewis cites seven cases involving "speech licensing regulatory schemes" that all involve punishment, and asserts that Missouri's vanity plate program licenses speech like those criminal laws (Br. Opp. 6). But Missouri's vanity license plate program is not a "speech" licensing scheme, at least not in the way that

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[1] This point was addressed in a recent article in the context of personalized license plates. Laurie D. Medley, Note, *FRESPCH: Vanity Plates and the First Amendment*, 25 Vt. L. Rev. 879, 903-04 (2001).

phrase has been used in prior cases. Missouri licenses motor vehicles, not speech.

The difference between a scheme that licenses speech and one that licenses motor vehicles is not a matter of semantics. The difference is in punishment. A speech licensing scheme is one under which a person can be punished, usually criminally, for speaking or attempting to speak without a license, such as by selling newspapers or by engaging in a public demonstration.[2] Under Missouri's license plate statute, a person can be punished for driving a vehicle without a license, but not for attempts at speech.[3]

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[2] Lewis cites the following cases: *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988) (licenses for newspaper vending machines); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976) (adult movie theater licensing statute upheld); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 (1969) (permits required for parades or public demonstrations); *Cox v. Louisiana*, 379 U.S. 536, 553-558 (1965) (peace disturbance statute; no license involved); *Kunz v. New York*, 340 U.S. 290 (1951) (permit for religious meetings); *Lovell v. Griffin*, 303 U.S. 444 (1938) (permit for pamphlet distribution); *Broadrick v. Oklahoma*, 413 U.S. 601(1973) (rejecting challenge to prohibitions on political activity by certain state employees).

[3] Lewis states, without citation or explanation, that Missouri's statute grants the power to "punish" politically unacceptable speech (Br. Opp. 6). But this entirely new argument is contrary to the statute and the uncontroverted record (Cert. Pet. 14).

This case involves the "speech" that is put onto the license plate itself; none of the cases cited by Lewis refer to restrictions on such speech, proposed by a citizen but printed by the State, as "speech licensing."

Rather than being like the cases Lewis cites, this case is most analogous those discussed in the petition, *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32 (1999) (*United Reporting*), and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (*Finley*). Lewis misses the mark in her effort to divert this case from the course followed in those.

Lewis claims that *Finley* is inapplicable because it involved criteria that were "merely advisory" in funding arts organizations (Br. Opp. 5). The Court did make the point that the criteria were advisory. But Lewis ignores the reason this Court made that point: the "advisory" nature of the criteria was relevant because that fact "undercut respondents' argument that the provision inevitably will be utilized as a tool for invidious viewpoint discrimination." 524 U.S. at 582. The "advisory" qualifier undercut that argument because it made unrealistic the danger of a "chilling" of speech. *Id.*

Here, too, the danger of "chilling" is unrealistic, regardless of whether the criteria are advisory. In fact, Lewis does not even attempt to explain how the Missouri criteria could "chill" private speech in the absence of any possible penalty. The court of appeals' rule, then, goes well beyond the *Finley* analysis by holding invalid a state statute that contains no penalty.

Lewis asserts that *United Reporting* is irrelevant because it dealt with access to government records and not to abridging speech (Br. Opp. 5). That is true, but it does not eliminate the connection between this Court's facial validity analysis and the court of appeals' corresponding analysis. This Court said there was no abridgement of speech "for purposes of facial invalidation" in *United Reporting* because there was no threat of punishment, and because the litigant was free to disseminate information already possessed. 528 U.S. at 40-41. Here, too, there is no threat of punishment or even a monetary sanction (such as the potential funding cutoff in *Finley*). And Lewis remains entirely free to make signs or say "ARYAN." Yet the court of appeals found a constitutional violation.

Thus in the Eighth Circuit, the threat of punishment or sanction is no longer a requirement for a finding that a statute is invalid on its face, so long as the statute does not expressly prevent viewpoint discrimination. Lewis belittles the threat of such a new rule, arguing, curiously, that the Eighth Circuit "should have limited [its] holding to . . . the narrow facts of this case" (Br. Opp. 5). Lewis calls the facial invalidity analysis "dicta," "unnecessary," and "merely advisory" (Br. Opp. 5). But elsewhere in her response, Lewis states that the facial invalidity analysis was part of the court of appeals' holding (Br. Opp. 2).

Consistent with that alternative concession, Lewis suggests that certiorari should be denied because the "as applied" argument could have been dispositive (Br. Opp. 5). She cites two cases for that proposition: *Renne v. Geary*, 501 U.S. 312 (1991); and *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518

U.S. 604, 624 (1996). But they stand for the proposition that the lower courts should not make a facial invalidity finding unless it is necessary to the outcome. Otherwise, the facial invalidity doctrine would become "a means of mounting gratuitous wholesale attacks upon state and federal laws." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85 (1989), *quoted in Renne v. Geary*, 501 U.S. at 324. What this Court identified in *Renne* and *Colorado Republican* as an improper course was precisely the one taken by the Eighth Circuit here. That error is a reason to grant, rather than deny, the writ.

2. Lewis's argument that there is nothing in the Eighth Circuit's "as applied" analysis that merits further review is based nearly entirely on an incorrect factual assertion. She precedes that assertion by correctly stating the law: that even in a nonpublic forum, viewpoint discrimination is prohibited. To draw this case into that realm, she then erroneously asserts that the Director of Revenue admitted that the decision to revoke the ARYAN-1 plate was viewpoint-motivated (Br. Opp. 7).

Even the court of appeals did not reach that conclusion. Instead, it assumed the sincerity of the Director's contention that the plate was rejected to prevent "road rage," and that the Department of Revenue "made no judgment about the viewpoint of [respondent's] speech" (Cert. Pet. App. A-22, 24). But had the court of appeals considered the entire record, it would have found that what it stated as an assumption was an uncontradicted fact. That record includes the Director of Revenue's deposition, where she explained: "The reason that the plate was denied was . . . based on public policy concerns in terms of

public safety . . . that [the plate] could in fact provoke road rage . . ." (Br. Opp. App. 1).[4]

With the factual error corrected, Lewis is left with the argument that considering reaction to speech is not permitted in determining how to regulate a nonpublic forum. As explained in the Petition, that position would depart from all precedent in the nonpublic forum area, and would thus merit this Court's attention.

The error in Lewis's assertion is irrelevant if she is saying, as she seems to imply, that when a public official is offended by a philosophy of racial genocide and acts in a manner consistent with that personal reaction, the action proves viewpoint discrimination *per se* (Br. Opp. 1). But

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[4] Lewis cites the district court opinion for the proposition that the Department of Revenue notified respondent that the ARYAN-1 plate was rejected because it "conveyed a message that is contrary to public policy" (Br. Opp. 1). Lewis's quotation does not include the subquotes around the phrase "contrary to public policy," which is significant because that is the only part of the quoted material that was in the Department's revocation notice to respondent (Pet. App. A-7). The "conveyed a message" clause was not in the Department's letter; it was the district court's paraphrase. To the extent Lewis is implying that the Department acted because the plate "conveyed a message" as opposed to threatening public safety, the implication is erroneous. The Eighth Circuit did not repeat the "conveyed a message" paraphrase in its opinion.

there is no constitutional rule on which such an argument could be based. Officials' stated opposition to a viewpoint has never been enough to prove that the opposition caused all their actions adverse to that viewpoint. If that is what the Eighth Circuit held, its decision broadly threatens the free speech rights of public officials: if they do not remain mute, they are compelled to approve requests that they oppose, even when they have alternative, constitutionally acceptable bases for rejection.

Lewis does not reduce the apparent threat of the Eighth Circuit's rule by citing "heckler's veto" cases (Br. Opp. 7) and suggesting this case falls within the bounds of that narrow set. She does not and cannot claim that, until this case, the prohibition on a "heckler's veto" has ever been applied to a nonpublic forum prior.[5] Courts

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[5] Following are the six cases cited by Lewis, including the pinpoint citation of the case where provided by Lewis, with a parenthetical explanation as to why the case has no bearing on a nonpublic forum "reaction to speech" analysis. In none of these cases does the majority use the phrase, "heckler's veto." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134-135 (1992) (ordinance imposing variable permit fees for demonstrations in a public forum was facially overbroad; no as-applied or nonpublic forum analysis); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988) (first amendment does not allow libel suits for damages for emotional distress; no as-applied or nonpublic forum analysis); *Murdock v. Pennsylvania*, 319 U.S. 105, 116 (1943) (reversing conviction of Jehovah's witnesses for

consistently allow restrictions on speech based on reactions to that speech in a nonpublic forum (Cert. Pet. 20-24).

Lewis also claims that this Court has already rejected the proposition that government can respond to the "secondary effects" of speech (such as reactions to speech). In support, she cites just one case: *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992) (hate crimes law facially invalid). But *R.A.V.* is neither an "as applied" nor a nonpublic forum case. It says nothing about whether the government can consider reactions to speech in a non-public forum.

3. In her Statement of Facts, Lewis suggests that Missouri's Director of Revenue did not, prior to or outside of this suit, assert that the ARYAN-1 plate was "inflammatory" (Br. Opp. 2). That suggestion presumably

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residential soliciting without a license; conviction cannot stand based on mere unpopularity of message with "established" churches; no nonpublic forum analysis and no contention of dangerous reactions); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 162 (1939) (convictions based on leafleting without a license reversed; no discussion of reaction to speech or nonpublic fora); *Gooding v. Wilson*, 405 U.S. 518 (1972) (criminal peace disturbance statute was facially overbroad because it covered non-fighting words; no as-applied or nonpublic forum analysis); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (criminal conviction for breach of peace based on merely inviting dispute cannot be sustained; no nonpublic forum analysis).

bolsters her effort to ensure this case is decided only based on the statute's reference to "public policy," and to stay away from its bar on state production of "inflammatory" plates. But the suggestion is inaccurate and irrelevant.

In the administrative proceedings that preceded the district court filing, the Director expressly argued that the plate was inflammatory. Lewis, who obviously knew what occurred in the administrative proceedings, did not suggest to the court that there had been a change in position by the Director, nor that a change in position would be relevant. But the district court, working from a record that did not include the administrative transcript, *sua sponte* assumed there was a change. On appeal, the Director moved to supplement the record to include the portion of the transcript referring to the plate as "inflammatory." The court did not rule on the motion, neither before rendering its opinion nor after the failure to rule was noted in a petition for rehearing. See *Director of Revenue's Motion to Supplement the Record*, 8/21/00; *Appellee/Cross-Appellant's Petition for Rehearing and for Rehearing En Banc*, at 13-14, 7/3/01.

Moreover, the "public policy"/"inflammatory" distinction is irrelevant here. The ARYAN-1 plate is against public policy *because* it is inflammatory (Br. Opp. App. 1). Neither Lewis nor the lower courts have suggested that executive officials are barred from doing what courts routinely do: rule on just one dispositive ground rather than address all possible bases for a decision. In its initial demand letter the Department cited "public policy," which it deemed to be a dispositive ground, and did not separately reference the "inflammatory" nature of the requested plate.

That the Department chose to act in that fashion has no constitutional significance.

CONCLUSION

For the reasons stated herein and in the Petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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